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IN THE

Supreme Court of the United States

JEREMIAH W. (JAY), NIXON,
ATTORNEY GENERAL OF MISSOURI,
Petitioner,

and

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Petitioners,

and

SOUTHWESTERN BELL TELEPHONE, L.P.,
F/K/A SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF COUNTIES, AND THE UNITED STATES CONFERENCE OF MAYORS, IN SUPPORT OF RESPONDENTS

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BRIEF OF AMICI CURIAE THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF COUNTIES, AND THE UNITED STATES CONFERENCE OF MAYORS, IN SUPPORT OF THE RESPONDENTS

The amici curiae, the International Municipal Lawyers Association, the National Association of Telecommunications Officers and Advisors, the National League of Cities, the National Association of Counties, and the United States Conference of Mayors, file this Brief in Support of the Respondent the file this Brief in Support of the Respondents, and have a compelling interest in the legal issues presented by this case.[1]

INTEREST OF AMICUS CURIAE

The amici consist of organizations representing local government officials throughout the United States. Since 1935, the International Municipal Lawyers Association ("IMLA") has been the primary advocate for the chief legal officers of local governments throughout the Untied States and Canada. Since its establishment, IMLA has advocated for the rights and privileges of local governments, and the attorneys who represent them. IMLA serves its membership by advocating the nationwide interests, positions, and views of local governments on legal issues. IMLA has appeared as an amicus curiae on behalf of its members before the United

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[1] Pursuant to this Court's Rule 37.2(a), letters of consent from the parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, amici represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

The National Association of Telecommunications Officers and Advisors ("NATOA") has represented the telecommunications needs and interest of local governments for over twenty years. NATOA serves as a professional association advising individuals and organizations responsible for telecommunications policies and services in local governments throughout the country.

The National League of Cities ("NLC") represents more than 18,000 communities and is the oldest and largest national organization representing municipal governments. Founded in 1924, NLC strengthens local government through research, information sharing, and advocacy on behalf of hometown America.

Created in 1935, the National Association of Counties ("NACo") ensures that the Nation's 3066 counties are heard and understood at all levels of the federal government. NACo's membership totals more than 2,000 counties, representing over 80 percent of the nation's population.

The United States Conference of Mayors ("USCM"), in existence since 1932, is the official nonpartisan organization of cities with populations of 30,000 or more. There are 1,183 such cities in the country today, each represented by its chief elected official, the mayor.

The amici's interest in this case arises from their efforts to protect local government abilities to provide the best possible economic development tools for individual communities. Congress enacted the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.) ("Telecommunications Act"), to promote competition in the delivery of telecommunications services. Many local governments serve communities that are too small or too distant from major population centers to attract private

entities capable of supporting broadband communications services. If these communities are to survive and thrive, they must have affordable access to the same advanced telecommunications services and capabilities widely available in metropolitan areas. These local governments cannot afford to wait for profit-maximizing telecommunications providers to turn their attention to rural areas.

A growing number of local governments, particularly those that operate their own electric utilities, have stepped forward to fill service gaps left by the private sector. They have done so either by providing telecommunications services themselves or by constructing telecommunications infrastructure and facilities to attract competitive providers to their communities. Upholding the Eighth Circuit's ruling paves the way for many more local governments to do the same.

SUMMARY OF THE ARGUMENT

Section 253 (a) of the Telecommunications Act of 1996 states without ambiguity that State actions prohibiting any entity from providing telecommunications services are to be preempted. The amici do not reach this conclusion lightly. In addition to the express language of the statute, the legislative history of the Telecommunications Act shows that Congress intended the phrase "any entity" to be all-encompassing and actively considered the need for public entities to provide telecommunications services.

ARGUMENT

First and foremost, the amici disfavor federal preemption of state and local government actions unless such preemption is essential to achieve a "clear and manifest purpose of Congress," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In particular, the amici support the principle enunciated in *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991), that a federal statute should not be construed to preempt traditional state or local powers unless Congress has made its

intent unmistakably clear in the language of the statute. This case presents one of those rare instances in which congressional language mandates federal preemption. This case does not require the Court to preempt a broad class of State action, but only those narrow actions which prohibit, or have the effect of prohibiting, local governments from providing telecommunications services. Amici *do not* argue or accede that Section 253 of the Telecommunication Act of 1996, 47 U.S.C. § 253(a) (1996), preempts all state or local actions. The Section must be evaluated in light of the facts of each individual case.

The facts of this case make clear that Missouri's express prohibition of the provision of telecommunications services by local government entities must be preempted. A variety of local governments have established public communications systems that contribute greatly to the economic development, educational and occupational opportunity, and quality of life of their residents. Unfortunately, State barriers to local government entry deny many other communities the ability to obtain prompt and affordable access to the full benefits of the "Information Age," which Congress intended them to have in enacting the Telecommunications Act. These benefits, including the ability to attract new businesses and retain existing ones, the ability to create attractive educational and employment opportunities, the ability to foster improved health care at lower cost, and the ability to create an environment in which residents can enjoy a high quality of life, rest on timely and inexpensive access to information and communications.

As former Federal Communications Commission Chairman Kennard cautioned Congress:

> Those cut off from these high-speed networks today will find themselves cut off from the economic opportunities of tomorrow. And more importantly, they will be cut off from the most important network that there is—the

> network of our national community. . . . We must always be looking for ways to remove barriers to investment and to promote competition. I am particularly concerned about deployment in rural areas and in inner cities. Given the early stage of deployment of advanced telecommunications generally, it may seem difficult to discern the extent of the disparity between rural and urban areas. But today's Report suggests that in the very short term, demand for high bandwidth will really start to take off. My concern is that a geometric increase in demand may be mirrored by a geometric increase in the urban-rural disparity.

Report on the Deployment of Advanced Telecommunications Capability to All Americans, 14 F.C.C.R. 2398, CC Docket No. 98-146, (February 2, 1999) (Separate Statement of Chairman Kennard). Former Chairman Kennard's statement foreshadowed the situation many communities face today. Those communities which desire to do so must be allowed to correct the "Digital Divide" that separates them from communities which are thriving in this new "Information Age."

I. THE LEGISLATIVE HISTORY OF SECTION 253(a) CONFIRMS THAT CONGRESS INTENDED THE PHRASE "ANY ENTITY" TO INCLUDE LOCAL GOVERNMENTS

Section 253(a) of the Telecommunications Act, 47 U.S.C. § 253(a) (1996), allows "No State or local statute or regulation, or other State or local legal requirement, [to] prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunications service" (emphasis added). The 104th Congress adopted this provision verbatim from Section 230(a) of the 103rd Congress's bill S.1822. Therefore, the legislative history of Section 253(a) begins with the history of S.1822, a point with which the Federal Communications Commission

(FCC) agreed in *City of Abilene v. Federal Communications Commission*, 164 F.2d 49 (D.C. Cir. 2000).

A. 103rd Congress' Understanding of "Any Entity"

Congress understood and intended that the preemption language that became Section 253(a) allow "any" entity to provide telecommunications services. During the 103rd Congress, representatives of local government associations and public power utilities educated Congress by bringing to light their members' willingness to provide telecommunications services themselves and their willingness to make their telecommunications infrastructure and facilities available to potential competitors of incumbent providers.

For example, the Senate learned of the Glasgow Electric Plant Board (GEPB), in Glasgow, Kentucky. The GEPB brought its small rural community into the Information Age and exceeded the achievements of the private sector in many larger communities. Prior to the GEPB's entry into the telecommunications market, a single, for-profit cable company served Glasgow. The citizens, unhappy with the quality and the price of the service, asked the local government-owned electric system for help. The GEPB obliged. The end result was a system that provided twice as many television channels as the competing, for-profit cable company, with lower rates and better service, in addition to a system which allowed consumers to purchase electricity in real time (allowing for energy cost savings). In response, the private company dropped its rates and improved its service. Hearings on S. 1822, The Communications Act of 1994, Before the Senate Committee on Commerce, Science and Transportation, 103d Cong, 2d Sess., A&P Hearings S.1822 (Statement of William J. Ray, on behalf of the American Public Power Association, 1994 WL 232976) at 351-61, ("*Senate Hearings on S.1822*").

The superintendent of the GEPB, William J. Ray, provided the Senate with a first-hand account of the GEPB's achievements and success. Mr. Ray presented written and oral testimony on behalf of the American Public Power Association. The text of a portion of that testimony, detailing the history, achievements, and goals of the project, is reproduced below.

> In the 1980s, Glasgow, a community of 13,000 residents, was served—but not very well—by a single, for-profit cable company. The citizens were unhappy with the quality and the price of their cable TV service, so they turned to their municipally owned electric system for help. This plea from the public coincided with the city utility's recognition of the need for an effective demand-side management and load shedding system to avoid huge increases in power costs driven by surges in peak power demand. The Glasgow Electric Plant Board recognized that the same coaxial cable system used to deliver television programming could also be utilized by citizens to manage their power purchases. So our municipally owned electric utility built its coaxial distribution control system which also provides a competing, consumer-owned cable TV system. This new system not only allowed consumers to purchase electricity in real time and lower their peak electrical demand, thus saving money on their electric bills, it provided twice as many television channels as the competing, for-profit cable company at not-for-profit rates—and delivered better service to boot. Big surprise—the private company decided to drop its rates by roughly 50 percent and improve its service, too.
>
> But the Glasgow Electric Plant Board didn't stop there. We wired the public schools, providing a two-way, high-speed digital link to every classroom in the city. We are now offering high-speed network services for personal computers that give consumers access to the local schools' educational resources and the local libraries.

> Soon this service will allow banking and shopping from home, as well as access to all local government information and databases. We are now providing digital telephone service over our system. That's right—in Glasgow, everyone can now choose to buy their dial tone from either GTE or the Glasgow Electric Plant Board.
>
> The people of Glasgow won't have to wait to be connected to the information superhighway. They're already enjoying the benefits of a two-way, digital, broadband communications system. And it was made possible by the municipally owned electric system.

Senate Hearings on S.1822, 1994 WL 232976 at *7. The GEPB experience showed that local government entities could provide access to the "Information Age," and could do so in a way that furthered Congress' pro-competitive ambitions. Mr. Ray also outlined for the Senate that different communities and public entities, specifically utilities, faced different needs, and Congress' desire for rapid advanced telecommunications deployment should not mandate one single model for all.

Mr. Ray noted that some public entities desired to follow in GEPB's footsteps and provide competitive telecommunications services themselves. Others would likely choose to simply provide their telecommunications infrastructure to telecommunications providers. Mr. Ray impressed upon the Senate the need to accommodate both groups and impressed upon the Senate the vital role public entities would play in achieving the goal of vigorous competition. Again, set out below is a portion of Mr. Ray's testimony:

> While all electric utilities have telecommunications needs, the manner in which these needs are met differs greatly among public power systems. Some public power systems satisfy their communications requirements primarily by leasing capacity from third parties. Other APPA members rely on communications systems

> built only to satisfy their own needs. Still others have built communications systems using some capacity on those systems for their own internal needs and leasing excess capacity to others (acting as the owner of a conduit rather than a telecommunications or information service provider). Finally, some public power communities have built communications systems to serve their own needs and to provide other telecommunications and information services to community residents and businesses.
>
> It is APPA's desire to ensure that whatever legislation is enacted, the diverse needs of the public power communities can be met. Specifically, this means that for those utilities who are likely to lease space over facilities owned by a third party, reasonable access terms, conditions and rates are required. For utilities that will develop and operate communications systems for their own use or to provide conduit but not content service to others, legislation should not saddle them with common carrier obligations. Nor should legislation place obstacles in the path to public ownership of new telecommunications facilities or the public provision of telecommunications services. Indeed, the goals of universal service and vigorous competition can be enhanced if such public ownership and involvement is encouraged.

Senate Hearings on S. 1822, 1994 WL 232976 at *5. Senator Trent Lott (R-MS) later remarked, "I think the *rural electric associations, the municipalities, and the investor-owned utilities, are all* positioned to make a real contribution in this telecommunications area, and I do think it is important that we make sure we have got the right language to accomplish what we wish accomplished here." *Senate Hearings on S.1822* at 378-79 (emphasis added). This statement shows that Congress understood the pivotal role local governments could play in developing telecommunications services.

Additional support for the congressional understanding of the need local government and public entity participation in telecommunications service provision is found in the Senate Report on S.1822. Summarizing the major features of the bill the Report recognizes that S.1822 allows all utilities to provide telecommunications services. The report states:

> Entry by electric and other utilities into telecommunications
>
> S. 1822 allows *all* electric, gas, water, [steam], and other utilities to provide telecommunications (section 302 of S. 1822, new section 230(a)).

S. Rep. No. 103-367, 103d Cong., 2d Sess. 22 (1994), 1994 WL 509063 at *22, ("*Senate Report on S.1822*"). "Section 302," referred to in the parenthetical above, contained various measures to promote competition and the "new Section 230(a)" contained the preemption language which later became Section 253(a) of the 1996 Telecommunications Act. The language regarding the provision of services by public entities and the preemption of explicit barriers to competition were wedded in Congress' contemplation of what eventually became the Telecommunications Act of 1996.

Other aspects of the legislative history also show that Congress intended for "any entity" to include local governments. For instance, the inclusion of all entities in the "any entities" phrase is shown by Congress' treatment of certain investor-owned electric utilities.

Specifically, the consideration given to public electric utilities shows Congress' intent to allow for public entity participation. The Public Utility Holding Company Act of 1935 ("PUHCA") was enacted in response to a broad range of abusive practices by investor-owned electric utilities controlled by certain major holding companies. Part of the PUHCA prohibited covered electric utilities from entering into lines of business outside their core electric functions.

However, to ensure that these electric utilities would be treated like other electric utilities under the Telecommunications Act, Congress was willing to remove these PUHCA restrictions. As the Senate Report on S.1822 explained, electric utilities had experience in the telecommunications arena and were capable of competing effectively as market participants in the provision of telecommunications services. The Senate Report outlined:

> [E]lectric utilities in general have extensive experience in telecommunications operations. Utilities operate one of the Nation's largest telecommunications systems-much of it using fiber optics.
>
> * * *
>
> [R]egistered holding companies have sufficient size and capital to be effective competitors.

Senate Report on S.1822, 1994 WL 509063 at *10-11. The Senate noted in 1995 that under the PUHCA a registered holding company was generally able to own an internal telecommunications system necessary for control of power plants and other utility uses, but "it and its subsidiaries [were] limited in their ability to sell excess telecommunications capacity to other parties." S. Rep. 104-23, 104 Cong., 1st Sess., 1995 WL 142161 at *4 (1995). The Senate also recognized that loosening these restrictions would *significantly promote competition*. Specifically:

> PUHCA restricts registered holding companies from investing in telecommunications infrastructure, specifically the construction of fiber optic links and other facilities for general service to the public. In addition, many end-use applications that could provide the incentive for investment in infrastructure construction may also exceed core utility functions and thus impede the ability of a registered holding company to invest. *As a result, registered holding companies may be precluded from competing in telecommunications and information*

> *markets, thus potentially limiting consumer choice and resulting in higher prices, unless current PUHCA restrictions are loosened with respect to investment in telecommunications infrastructure and applications. Entry by utilities could significantly promote and accelerate competition in telecommunications services and deployment of advanced networks.*

S. Rep. 104-23, 104 Cong., 1st Sess., 1995 WL 142161 at *4 (1995). Discussing universal service and local competition, this Senate Report also described the legislation as reforming "the regulatory process to allow competition for local telephone service by cable, wireless, long distance, and satellite companies, and *electric utilities, as well as other entities*." S. Rep. 104-23, 104 Cong., 1st Sess., 1995 WL 142161 at *4 (1995).

The Senate Report on S.1822 (in 1994) shows that the Congress followed Mr. Ray's suggestions. S. 1822 contemplated that public power utilities considering becoming telecommunications providers would be treated like all other providers of such services. The Senate Report also makes clear that S. 1822 allowed utilities to make available their infrastructure and facilities to telecommunications provers without themselves becoming telecommunications carries. This is evidenced by S.1822 definition of the term "telecommunications service" as *"the direct* offering of telecommunications for profit to the general public or to such classes of users as to be effectively available to the general public regardless of the facilities used to transmit such telecommunications services." *Senate Report on S. 1822*, 1994 WL 509063 at * 56 (emphasis added).

If the definition of "any entity" were as limited as the State of Missouri, the FCC, Southwestern Bell, and their amici argue, Congress' statements would be nonsensical. The recognition of utilities experience in the provision of the telecommunications services shows Congress actively

contemplated the contribution public entities could make to telecommunications, as does the recognition of utilities' size and capital.

The 103rd Congress ended without passage of new telecommunications legislation. But Congress' work on what was to become Section 253(a) of the Telecommunications Act was essentially done. There is little additional legislative history on this issue. What exists, corroborates that the 104th Congress understood and intended that the term "any entity" apply to local governments, particularly those that operate their own electric utilities.

B. The 104th Congress Also Understood "Any Entity" to Include Local Governments

As the 104th Congress considered the Telecommunications Act of 1996, it too understood any entity to include public, local government entities. During the floor debates in the Senate on June 7, 1995, Senator Lott summarized the major features of the Telecommunications Act. First, Senator Lott explained that PUHCA was being amended "to allow registered electric utilities to join with *all other utilities* in providing telecommunications services, providing the consumer with smart homes, as well as smart highways." 141 Cong. Rec. S7906 (June 7, 1995) (emphasis added). Second, Senator Lott observed, "In short, [the Act] constructs a framework where *everybody* can compete *everywhere* in *everything*. It limits the role of Government and increases role of the market." 141 Cong. Rec. S7906 (June 7, 1995) (emphasis added).

As a key sponsor and floor manager of the Telecommunications Act, Mr. Lott's statements are entitled to substantial weight. *Lewis v. United States*, 445 U.S. 55, 63 (1980) (Senator's statements as the sponsor and floor manager of the bill were entitled to weight); *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (A

statement of one of the legislation's sponsors deserves substantial weight); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951) (Sponsors inform the meaning of the statutory words).

The 104th Congress' understanding that Section 253(a) applied to all entities is supported by language in the final Joint Explanatory Statement of the Committee of Conference on the bills that became the Telecommunications Act. The Joint Explanatory Statement shows that Congress anticipated that public entities would choose to provide telecommunications services. Discussing utilities in particular, the Joint Explanatory Statement provides, in addition to safeguarding the rights of consumers of traditional telecommunications providers, States could also protect consumers of *other utilities* which provide telecommunications services:

> In addition to consumers of telecommunications services, the conferees intend that this includes the consumers of electric, gas, water or steam utilities, *to the extent such utilities choose to provide telecommunications services.* Existing State laws or regulations that reasonably condition telecommunications activities of a monopoly utility and are designed to protect captive utility ratepayers from the potential harms caused by such activities are not preempted under this section.
>
> H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess., 1996 WL 46795 at *127 (1996) (emphasis added).

The Joint Statement included one vital and important caveat, crucial to the outcome of this case:

> ***However, explicit prohibitions on entry by a utility into telecommunications are preempted under this section.***
>
> H.R. Rep. No. 104-458, 104th Cong., 2d Sess., 1996 WL 46795 at *127 (1996) (emphasis added).

The Report's discussion of a utility's *choice* in the matter of telecommunications provision exhibit's Congress intent to leave this

decision with the individual public entity, not with State governments. These statements, combined with the express statutory language preempting State actions which prohibit or have the effect of prohibiting the provision of telecommunications services by any entity, show the full extent of Congress' will to allow *all* entities to provide telecommunications services.

II. ANTI-COMPETITIVE ACTIONS OF TELECOMMUNICATIONS PROVIDERS SINCE THE ENACTMENT OF THE TELECOMMUNICATIONS ACT

The Telecommunications Act passed with wide support in both the House of Representatives and the Senate. Soon after the Telecommunications Act became law, however, the incumbent telecommunications providers began to thwart the pro-competitive purposes of the Telecommunications Act.[2] Incumbent providers introduced measures in several states to stop or significantly delay local government entry.

Some incumbents focused on obtaining outright prohibitions on local government entry into the market of telecommunication services provision. In addition to Missouri, they successfully persuaded the legislatures of several states to prohibit local government and public entities from providing telecommunications services. Other providers preferred a more subtle strategy, choosing to ignore the vast advantages of incumbency, and pretending to be

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[2]H. Frisby, Jr., and J. Windhausen, Jr., *Bell Companies Thwart Competition*, Charleston Gazette (September. 25, 2002), http://www.wvgazette.com/display_story.php3?sid=200209246&format=prn;

J. Glassman, *For Whom the Bells Still Toll*, Washington Times (April 25, 2001), http://www.aei.org/ra/raglas010425.htm;

AT&T News Release, AT&T Files Petition For Structural Separation of BellSouth, (March 21, 2001), http://www.att.com/news/item/0,1847,3720,00.html.

severely *disadvantaged* because of the supposed tax and regulatory advantages that local government utilities enjoy.

The goal of these state legislative efforts was to prevent local governments from entering the market as telecommunications providers. The *Wall Street Journal* commented on this trend, noting, "The companies figure that, stripped of their financial perks, cities would be less likely to enter the telecommunications market." J. Ball, *Georgia Cities Face Battle to Enter Telecom Area*, Online Wall Street Journal (March 26, 1997).

III. LOCAL GOVERNMENTS ACROSS THE COUNTRY ARE PROMOTING COMPETITION IN THE PROVISION OF TELECOMMUNICATIONS SERVICES

One of the purposes of the Telecommunications Act was to "accelerate rapidly private sector deployment of telecommunications and information technologies." H.R. Conf. Rep. No. 104-458, 104 Cong., 2d Sess., 1996 WL 46795 at * 113 (1996), (Joint Explanatory Statement). Logic indicates, however, that the purpose of accelerating private deployment is not contrary to market entry by public entities. On the contrary, provision of telecommunications services by public entities has been instrumental in spurring private entities in several respects. Public participation stirs competition, provides incentives, and sometimes even provides resources to the private sector which would not ordinarily be available.

The State of Missouri asserts that the state legislators represent the will of the people of Missouri when enacting regulations preventing local governments from competing to provide telecommunications services to their residents. The State, however, overlooks the fact that the mayors, city and county council members, and other elected officials of local government also represent the will of the people. More often that not, residents have a much closer relationship with their

local elected officials than with state representative. Local officials who make decisions regarding the public provision of telecommunications services do not do so in a vacuum. They reach these decisions after extensive consultation with and comments from their constituency. The results of just two of many of those decisions are noted below.

Tacoma, Washington provides a prime example of local government successfully providing telecommunications services for the benefit of its community. The City is one of several providers of cable television services and one of two providers of high-speed internet access for the residents of Tacoma. The prices for both the cable television and internet services are lower than is found in areas where there is no competition as a direct result of Tacoma's entry into the market.[3] The City's entry into the market fulfilled the congressional goal of competition in telecommunications services embodied in the Telecommunications Act.

Kutztown, Pennsylvania also provides telecommunications services to its residents. Faced with charges from private telecommunications providers that its entry into the telecommunications market was a failure, the Borough of Kutztown has responded vociferously that its projects was instead a success. Initially, Kutztown sought to simply improve its infrastructure and partner with a large private telecommunications provider to bring its residents into the Information Age. The Borough was unable to find a private partner willing to share the burden of updating its system and thus entered the market as a provider. Today, Kutztown's residents enjoy significant monetary savings in addition to being able to access the latest technologies. Kutztown's experience has been such a success that it was recently

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[3] J. Glasner, Cities Deliver Broadband for Less http://www.wired.com/news/business/0,1367,57927-2,00.html.

awarded the Governor's Award for Local Government Excellence.[4]

These are but two examples of many success stories. Even these simple examples show that a vital and crucial method to Congress' goal of "accelerat[ing] rapidly private sector deployment of telecommunications and information technologies" is competition from the public sector. The public sector understands how to provide telecommunications services and is equipped to do so. Congress recognized these capabilities when it allowed "any entity" to provide service. Had it meant to exclude public entities, Congress would have preempted only those State regulations which prohibit "private entities" from providing services.

[4] http://www.inventpa.com/default.aspx?id=152.

CONCLUSION

Ultimately, this case is not about the successes stemming from any particular public local government entity's decision to enter the telecommunications market as a provider, though those successes validate Congress' actions. It is about congressional intent to ensure competition in the provision of telecommunications services. Congress specifically stated its intent to preempt outright prohibitions in the Telecommunications Act:

> No State . . . statute or regulation, or other State . . . legal requirement, may prohibit . . . the ability of *any entity* to provide any interstate or intrastate telecommunications service"

Section 253 of the Telecommunication Act of 1996, 47 U.S.C. § 253(a) (1996), (emphasis added). State statutes which expressly prohibit the provision of services by public, local government entities should be preempted.

Respectfully submitted,

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